

1  
2  
3  
4  
5                   UNITED STATES DISTRICT COURT  
6                   EASTERN DISTRICT OF WASHINGTON  
7

8                   UNITED STATES OF AMERICA,         }  
9    }  
10    }  
11    }  
12                   vs.    }  
13    }  
14    }  
15    }  
16                   TERRY WILLIAM SMITH,                 }  
17    }  
18    }  
19    }  
20    }  
21    }  
22    }  
23    }  
24    }  
25    }  
26    }  
27    }  
28    }

No. CR-04-2044-AAM

**MEMORANDUM OPINION**

On May 16, 2006, defendant was re-sentenced to a term of imprisonment of 63 months, a period of supervised release of three years, and a fine of \$5,000. Re-sentencing occurred after the Ninth Circuit Court of Appeals vacated the original sentence imposed by this court, taking issue with the \$10,000 fine imposed and the directive that it be paid from defendant's IRA (Individual Retirement Account) "if available."

As is apparent from the undersigned's remarks from the bench during re-sentencing, the imposition of a \$5,000 fine is based on the various factors set forth in 18 U.S.C. §3572(a). Notable among the factors considered by the court is the defendant's considerable past involvement with the criminal justice system and the corresponding cost, as well as the expected cost of the imprisonment and supervised release now imposed by this court, 18 U.S.C. §3572(a)(6). The court believes this factor warrants imposition of a real fine and an effort to collect it as well. Also

1 considered is “the defendant’s income, earning capacity, and financial resources.”  
 2 18 U.S.C. §3572(a)(1). With respect to earning capacity, this court took into  
 3 account defendant’s age, and with respect to financial resources, took into account  
 4 defendant’s lack of debt and his ownership of a savings account (approximately  
 5 \$850) and an Individual Retirement Account (IRA)(approximately \$11,000).<sup>1</sup> The  
 6 court believes it is appropriate to consider the IRA funds as part of defendant’s  
 7 “income, earning capacity, and financial resources”in determining whether to  
 8 impose a fine and the amount of the same. 18 U.S.C. §3572(a)(1).<sup>2</sup> This  
 9 memorandum opinion sets forth the legal basis for arriving at that conclusion,  
 10 although it is reiterated that imposition of the fine does not depend exclusively on  
 11 the existence of the IRA.

12 Defendant contends that under Washington law, his IRA is “exempt from  
 13 execution, attachment, garnishment, or seizure by or under any legal process.”  
 14 RCW §6.15.020(3). Defendant cites *In re Nelson*, 180 B.R. 584 (9<sup>th</sup> Cir. 1995), for  
 15 the proposition that tax-deferred individual retirement accounts are covered by this  
 16 Washington statute. At issue in *Nelson* was whether a Chapter 7 debtor was entitled  
 17 to an exemption for his IRA so that it would not be included in the bankruptcy  
 18 estate.<sup>3</sup> The bankruptcy appellate panel (BAP) concluded he was entitled to the  
 19 exemption because the exemption was not preempted by the federal ERISA  
 20 (Employee and Retirement Income Security Act of 1974). “The definition of an

---

21  
 22       <sup>1</sup> At the time the original sentence was imposed, this court’s information  
 23 was that there was approximately \$20,000 in the IRA.

24       <sup>2</sup> The Sentencing Guidelines indicate a fine should be imposed unless the  
 25 defendant establishes he is unable to pay a fine and is not likely to become able to  
 26 pay a fine in the future. U.S.S.G. §5E1.2(a).

27       <sup>3</sup> Bankruptcy exemptions are found in 11 U.S.C. §522 and exemptions  
 28 arising under state law are specifically recognized as applicable in the appropriate  
 circumstance.

1 employee benefit plan as defined in ERISA does not include an IRA.” *Id.* at 587.  
2 Defendant contends his IRA is not an ERISA account (presumably because it is not  
3 an “employee benefit plan”) and therefore is governed by Washington law, instead  
4 of ERISA. Even if it were an ERISA account, however, defendant contends funds  
5 from the account could not be collected for payment of a fine, citing *United States*  
6 *v. Jackson*, 229 F.3d 1223 (9<sup>th</sup> Cir. 2000).

7       *Jackson* was very recently distinguished by the Ninth Circuit Court of  
8 Appeals in *United States v. Novak*, 441 F.3d 819 (9<sup>th</sup> Cir. 2006). In *Novak*, the  
9 district court quashed its writ of garnishment of the defendant’s benefits under a  
10 pension plan subject to ERISA. As part of a criminal sentence, the defendant had  
11 been ordered by the district court to pay restitution. At the government’s request, a  
12 writ of garnishment was issued pursuant to the Federal Debt Collection Procedures  
13 Act (FDCPA), 28 U.S.C. §3205, in an attempt to collect the ordered restitution.  
14 The district court quashed the writ, finding it was prohibited by ERISA’s anti-  
15 alienation provision. The Ninth Circuit Court of Appeals disagreed, finding the  
16 Mandatory Victims Restitution Act (MVRA) of 1996, 18 U.S.C. §3663A, in  
17 conjunction with 18 U.S.C. §3613, constituted a statutory exception to ERISA’s  
18 anti-alienation provision. The court of appeals found the MVRA is a specific  
19 collection statute designed to provide victims with restitution and that Congress  
20 provided for restitution orders to be enforced like tax liens, which are enforceable  
21 against ERISA pension benefits. *Id.* at 822. The court of appeals also found that  
22 ERISA pension plans do not fall within any of the exemptions listed in 18 U.S.C.  
23 §3613 entitled “Civil remedies for satisfaction of an unpaid fine.” *Id.* at 822-23.  
24 The court of appeals noted its holding was in accord with lower court decisions  
25 from around the country, including *United States v. Sowada*, 2003 WL 22902613  
26 (E.D. La. Dec. 9, 2003)(holding that “the United States can garnish ERISA funds  
27 for satisfaction of criminal fines and penalties” and observing that to “hold  
28 otherwise would give convicted criminal defendants greater rights than those who

1 owe a tax debt to the government”), and *United States v. Rice*, 196 F.Supp. 1196,  
 2 1202 (N.D. Okla. 2002)(“With the passage of 18 U.S.C. §3613, Congress created an  
 3 exception to ERISA’s anti-alienation provision by subjecting all of a criminal  
 4 defendant’s property to execution for the collection of a criminal fine”). *Id.* at 824-  
 5 25. Finally, the court of appeals observed that its decision was not inconsistent with  
 6 *Jackson* in which neither party had called the MVRA to the court’s attention. *Id.* at  
 7 825.

8 If the funds in defendant’s IRA are ERISA funds, it appears they could be  
 9 garnished to collect a criminal fine imposed by this court. If they are not ERISA  
 10 funds, the question is whether the exemptions under Washington law trump federal  
 11 law and prevent collection of a federal criminal fine pursuant to the FDCPA.  
 12 Defendant acknowledges that exemptions under Washington law are subject to  
 13 federal preemption, but asserts the United States cannot point to any federal statutes  
 14 preempting application of RCW §6.15.020(3) to defendant’s IRA. 18 U.S.C.  
 15 §3613(a), however, provides that “a judgment imposing a fine may be enforced  
 16 against **all** property or rights to the property of the person fined.” (Emphasis  
 17 added). There are exemptions listed in subsection 18 U.S.C. §3616(a)(1), but it is  
 18 not apparent that any of those exemptions include IRAs.<sup>4</sup>

---

19

20       <sup>4</sup> The exemptions are incorporated by reference from 26 U.S.C. §6334 of the  
 21 Internal Revenue Code. They include: “wearing apparel and school books” (26  
 22 U.S.C. §6334(a)(1)); “fuel provisions, furniture and personal effects” (26 U.S.C.  
 23 §6334(a)(2); “books and tools of a trade, business, or profession” (26 U.S.C.  
 24 §6334(a)(3); “unemployment benefits” (26 U.S.C. §6334(a)(4); “undelivered mail”  
 25 (26 U.S.C. §6334(a)(5); “certain annuity or pension payments” (26 U.S.C.  
 26 §6334(a)(6); “workmen’s compensation” (26 U.S.C. §6334(a)(7); “judgments for  
 27 support of minor children” (26 U.S.C. §6334(a)(8)); “certain service-connected  
 28 disability payments” (26 U.S.C. §6334(a)(10)); and “assistance under Job Training  
 Partnership Act” (26 U.S.C. §6334(a)(12)).

With regard to “certain annuity and pension payments,” 26 U.S.C. §6334(6)  
 specifies that the exemption pertains to:

1       There is a reasonable basis to believe there is federal preemption which  
2 would allow garnishment of defendant's IRA to satisfy a federal criminal fine,  
3 notwithstanding Washington's exemption at RCW §6.15.020(3). That said, this  
4 court fully understands that others are responsible for collecting fines and the  
5 manner in which they are to be collected. This court is not conclusively  
6 determining now that defendant's IRA funds are subject to garnishment. That issue  
7 will be ripe for determination if and when there is an attempt to garnish the IRA.  
8 Because, however, there is a reasonable basis, at this time, to believe defendant's  
9 IRA funds could be used to satisfy a fine, the court has considered those funds as  
10 **part** of defendant's "income, earning capacity, and financial resources" pursuant to  
11 18 U.S.C. §3572(a)(1).

12 //

13 //

14 //

15 //

16 //

17 //

18

19

20       Annuity or pension payments under the Railroad Retirement  
21 Act, benefits under the Railroad Unemployment Insurance Act,  
22 special pension payments received by a person whose name has  
23 been entered on the Army, Navy, Air Force, and Coast Guard  
24 Medal of Honor roll (38 U.S.C. 1562), and annuities based on  
25 retired or retainer pay under chapter 73 of title 10 of the United  
26 States Code.

27

28       Unlike 11 U.S.C. §522 of the Bankruptcy Code, 18 U.S.C. §3613(a)(1) does  
not specifically recognize any exemptions arising under state law.

Considering all of the factors set forth in §3572(a), even if the defendant is unable to pay the \$5,000 fine now, it is likely he will be able to pay it in the future.<sup>5</sup>

3 The District Executive shall forward copies of this memorandum opinion to  
4 counsel and to the U.S. Probation Office (Yakima).

**DATED** this 22<sup>nd</sup> of May, 2006.

s/ Alan A. McDonald  
ALAN A. McDONALD  
Senior United States District Judge

<sup>5</sup> Liability to pay a fine terminates the later of 20 years from the entry of judgment or 20 years after the release from imprisonment of the person fined, or upon the death of the individual fined. 18 U.S.C. §3613(b).